

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

**IN RE BLUE CROSS BLUE SHIELD
ANTITRUST LITIGATION
MDL 2406**

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: **Master File 2:13-cv-20000-RDP**
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:
: **This document relates to**
: **Subscriber Track cases**
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SUBSCRIBER PLAINTIFFS' NOTICE OF SUPPLEMENTAL AUTHORITY

Subscriber Plaintiffs respectfully submit this Notice of Supplemental Authority to alert the Court to the recent decision by the United States Court of Appeals for the Eleventh Circuit in *Shiyang Huang, et al v. Equifax Inc., et al.*, No. 20-10249 (June 3, 2021), a copy of which is attached hereto. As relevant here, the Court of Appeals in *Equifax* affirmed the District Court's decision to grant final approval to a settlement agreement that resolved the claims asserted on behalf of the class of victims of the 2017 data privacy breach of Equifax Inc., and it also affirmed the District Court's approval of class counsel's application for attorney's fees of \$77.5 million, which amounted to over 20 percent of the \$380.5 million common settlement "megafund" created for the class.

The decision, which was handed down less than a week after counsel for Subscriber Plaintiffs submitted their motion for approval of their attorney's fees and expenses application, strongly supports Subscriber Counsel's analysis of the factors governing this Court's review of their fee application and confirms the reasonableness of the requested percentage award. Among other things, the Court of Appeals reaffirmed that district courts in this Circuit should use the percentage method (and not the lodestar method) to evaluate proposed fee awards in common fund

settlements, Slip Op. at 52-54; *see id.* at 53 (“The percentage method therefore remains the proper method to apply when awarding attorney’s fees in common fund settlement cases.”), and that 25 percent remains the benchmark percentage award, *id.* at 57, n.28. The Court of Appeals also reaffirmed that a trial court is required to consider the 12 *Johnson* factors when assessing the reasonableness of a percentage award, *id.* at 50-51, and is not required (although is permitted) to perform a lodestar cross-check when assessing such a fee request, *id.* at 54-55 n.26. Finally, the Court of Appeals declined to add a separate requirement that the courts expressly consider so-called “economies of scale” to reduce a percentage award in “megafund” cases, *id.* at 55-56, recognizing that courts have repeatedly awarded fees at or above the 25 percent benchmark in such cases, *id.* at 56-57, and acknowledging that such a sliding scale approach “provides no direction to courts about when to start decreasing the percentage award, nor by how much,” and “could also create ‘perverse incentives’ as it may encourage class counsel to pursue ‘quick settlements at sub-optimal levels.’” *Id.* at 55 (quoting 5 Newberg § 15.80).

In all of these respects, the Court of Appeals’ decision confirms and reinforces the points made by Subscribers Counsel in their memorandum in support of the fee application. *See, e.g.*, ECF No. 2733-1 at 30-34 (percentage method used in common fund cases); 31 (discussing the 25 percent benchmark); 39-64 (application of the *Johnson* factors establishes reasonableness of proposed fee award); 64-66 (lodestar cross-check confirms reasonableness of proposed fee award); 67-74 (use of sliding scale would create perverse incentives).

The Court’s opinion also provides guidance and clarification regarding the standards that govern both class certification and final settlement approval, and Subscriber Plaintiffs intend to

fully address all of these elements of the *Equifax* decision, as appropriate, when we file our motion for final approval of the settlement later this year.¹

Dated: June 9, 2021

Respectfully Submitted,

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¹ A petition for rehearing and suggestion for rehearing *en banc* has been filed by one of the Appellants in *Equifax*, arguing that the panel erred with respect to jurisdictional issues that are not relevant to this case. See Appellant Shiyang Huang's Petition for Rehearing and for Rehearing *En Banc*, *Shiyang Huang, et al v. Equifax Inc., et al.*, No. 20-10249 (Filed June 7, 2021).

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CERTIFICATE OF SERVICE

I hereby certify that on June 9, 2021, the foregoing Notice of Supplemental Authority was filed with the Clerk of the Court and served on counsel of record via ECF.

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